IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.58 of 1995

Decided on : November 13, 2006

Garib Dass **…..Appellant.**

VERSUS

Jeewan and others **…..Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant : **Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, counsel for the appellant.**

For the Respondents : **Mr. K.D. Sood, Advocate, with Mr. B.K. Sood, Advocate, for respondents No.2 and 3(a) to 3(c).**

None for other respondents.

Surjit Singh, Judge (Oral)

Heard and gone through record.

2. Appellant-plaintiff filed a suit for issuance of permanent prohibitory injunction against the respondents-defendants, seeking to restrain them from causing any interference in his land bearing Khasra No.4253/3024, measuring 9 *Marlas*, situate in Una town. In the alternative, he sued for possession. It was alleged that the plaintiff's father had purchased the suit land alongwith another parcel of land, at a public auction, in the year 1925 and that after that plaintiff's father continued to be in possession and on the death of the father of the plaintiff, the plaintiff and his co-heirs came in possession. Defendants were alleged to have started throwing

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Whether the reporters of the local papers may be allowed to see the Judgment?

threats to interfere in the possession of the plaintiff and to forcibly dispossess him.

3. Respondents-defendants contested the suit. They pleaded that the suit land had been sold by Kanshi Ram, the father of the plaintiff, to two Mohammedan ladies in the year 1946 and mutation had also been entered but before the same could have been attested, the two ladies migrated to Pakistan and, thus, the suit land had become evacuee property and the defendants purchased it from the custodian of evacuee properties in the year 1960. In the alternative, plea of adverse possession was raised. It was alleged that the respondents-defendants had been in possession of the suit land since the year 1947 and their possession was open, hostile, continuous, uninterrupted and as of right.

4. Trial Court framed various issues based on the pleadings of the parties and received the evidence adduced by the parties. Ultimately, it was held that the plaintiff was owner alongwith other co-heirs of the suit land and the suit was decreed. The respondents-defendants were restrained by means of permanent prohibitory injunction from causing any interference in the possession of the appellant-plaintiff over the suit land.

5. Respondents-defendants went in appeal to the Court of District Judge. Learned District Judge has accepted the appeal and dismissed the suit of the appellant-plaintiff. The learned District Judge has returned the finding that the predecessor of the appellant-plaintiff having sold the suit land to two Mohammedan ladies before the partition of the country and those ladies having

migrated to Pakistan, the suit land is to be deemed to have become evacuee property. With this finding, the learned District Judge has rejected the plea of the appellant that he is the owner of the suit land alongwith other heirs of his deceased father Kanshi Ram. At the same time, the learned District Judge has given the finding that even though the respondents-defendants do not appear to have purchased the suit land from the custodian of evacuee properties, they have been shown to be in its continuous possession since 1947 and have thus acquired title by prescription.

6. Learned District Judge appointed one Local Commissioner to carry out the demarcation on the spot. The Local Commissioner gave the report that a portion of the suit land, to the extent of about half a *Marla*, is under the house of the respondents-defendants and that the remaining portion of the suit land is lying vacant.

7. Appellant-plaintiff, aggrieved by the judgment and decree of the learned District Judge, filed the present appeal. The same was admitted on the following substantial questions of law:

1. Whether the presumption of truth of entries of title in favour of the plaintiff-appellant has been said to be rebutted merely on the ground that the tenant recorded prior to partition migrated to Pakistan being Muslim?

2. Whether Exhibit DD, mutation of the alleged oral sale could be held to be wrongly rejected by the learned Lower Appellate Court, when there was no proof before the learned Appellate Court, regarding the report Rojnamcha on the basis of which such mutation was entered?

3. Whether to prove the oral sale, is it incumbent to prove the factum of oral sale being reported to Patwari by the Vendor and Vendee and delivery of possession on the basis of the oral sale?

4. Whether Exhibit DW-7/A can be said to be a legal demarcation Report making the basis for holding the defendants to be the owners of the suit property?

5. Whether during demarcation, the title can be decided by the Demarcating Officer or the said jurisdiction vests with the Civil Court?

6. Whether the demarcation report is decisive of the title of the suit property when only the portion of the suit land is found to be in possession of defendant-respondents having construction thereupon. Could the presumption of title or possession be extended to the whole of the suit land?

7. Whether the learned Lower Appellate Court has misconstrued the provisions of Article 65 of Limitation Act, is it not incumbent upon the person asserting the hostile title to the suit property to have established the precise time when the title becomes adverse to the true owners?

8. Whether the Judgement of the learned Lower Appellate Court is vitiated due to misreading of the documentary evidence on the record especially the revenue record prior to and after consolidation?

9. Whether the property in dispute can be termed as Evacuee Property, are such findings vitiated for non-consideration of the relevant statutes governing the character of the property being Evacuee property?

8. It is true that a mutation was entered in the year 1946 for the transfer of ownership of the suit land in favour of two Mohammedan ladies, based on an oral sale made by the predecessor of the appellant-plaintiff, but the same was not attested, because in the meanwhile partition of the country took place and the two Mohammedan ladies migrated to Pakistan. It appears from the order of mutation, copy Ex. DD, that the predecessor of the appellant-plaintiff took the plea that the sale had

not been completed, in as much as the possession of the land remained with him. After the rejection of the mutation, the land continued to be shown in the ownership and possession of the predecessor of the appellant-plaintiff. There is nothing on the record suggesting that the suit land was declared evacuee property or that any evacuee number was assigned to it. On the contrary, entries in the *Jamabandis*, to which presumption of truth attaches, as also in the *Khasra Girdawari*, continue to show the appellant's father Kanshi Ram and after his death his heirs, including the appellant-plaintiff, as owners in possession of the suit land. Had the property been declared as evacuee property, name of the father of the plaintiff-appellant and after his death the names of the plaintiff and his co-heirs would not have been shown in the ownership and possession columns of *Jamabandis* and *Khasra Girdawaris*. Not only this, the suit land, as per entries in the *Jamabandi*, continued to be cultivated by the appellant-plaintiff and his co-heirs up to the year 1988. In the record prepared by the Settlement Authorities also it is the appellant-plaintiff and his co-heirs who have been recorded in possession of the suit land as owners. In the light of this overwhelming evidence, the District Judge was not justified in drawing the presumption that the property is evacuee property or it is to be deemed evacuee property.

9. On the basis of the report of the Local Commissioner, appointed by the District Judge, wherein it is reported that a very small fraction of the suit land is under the house of the respondents-defendants, the learned District Judge has drawn a presumption that the rest of the land is also in possession of the respondents-

defendants. There was no justification for drawing of such presumption, particularly when the above discussed entries in the revenue record show that up to the year 1988 the plaintiff and his co-heirs had been cultivating the suit land and growing two crops a year on this land. At present, as per the report of the Local Commissioner, the suit land, except a small fraction which is covered under the house of the respondents-defendants, is lying vacant. Under these circumstances, the District Judge was not justified in drawing the presumption that the vacant part of the suit land is in occupation of the respondents-defendants.

10. As a result of the above discussion, questions No.1, 6, 7, 8 and 9 are answered in favour of the appellant-plaintiff.

11. Questions No.2 and 3 are not relevant for deciding the issues involved, because this is a suit for injunction and also because in the absence of the Central Government, which is supposed to be the owner of the evacuee property, these two questions cannot be gone into and adjudicated.

12. As regards Questions No.4 and 5, before the institution of the suit demarcation had been carried out by a Kanoongo, on an application of the appellant-plaintiff, and report Ex. DW-7/A was given. As per this report, the suit land was reported to be in possession of the respondents-defendants. Questions of title and possession of immoveable property cannot be determined on the basis of the reports of the demarcation given by Kanoongos. The learned Trial Court gave very sound reasoning, in its judgment, for not giving any credence to this report. The first Appellate Court, without recording any reasons for not agreeing with the finding and

the view of the trial Court, has held that the report Ex. DW-7/A also substantiates the claim of the respondents-defendants.

13. As a result of the above discussion, the appeal is accepted. Judgment and decree of the first Appellate Court are set aside and those of the trial Court are restored.

14. Appeal stands disposed of.

November 13, 2006(sd) **(Surjit Singh), J.**